Supreme Court, U.S.
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NO. _____

In The
Supreme Court of The United States
October Term 1995

PENNSYLVANIA TURNPIKE COMMISSION, ROBERT BRADY, JOHN STEWART and VINCENT GRECO

Petitioners

vs.

CHARLES CHRISTY ,

Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI OF PETITIONERS PENNSYLVANIA TURNPIKE COMMISSION, ROBERT BRADY, VINCENT GRECO, AND JOHN STEWART

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89 pp

QUESTIONS PRESENTED

1. Whether the Third Circuit improperly denied qualified immunity by ruling that it must view the facts in the light most favorable to plaintiff and refusing to consider whether the Petitioners could reasonably have believed their conduct was "objectively reasonable", as required consistently by this Court and by most other Courts of Appeal.

2. Whether, on Petitioners' Eleventh Amendment immunity claim, the Third Circuit improperly adopted for the first time a new standard shifting the burden on summary judgment to the defendants to affirmatively establish their entitlement to immunity, but refused to remand for development of a factual record under the new standard.

LIST OF ALL PARTIES

The Petitioners herein are the Pennsylvania Turnpike Commission, Robert Brady, Vincent Greco, and John Stewart, defendants below.

Additional defendants, not involved in this appeal, are John A. Boschi, James J. Dodaro, Howard Yerusalim, Frank A. Ursomarso, James F. Malone, III, John L. Sokol, Jr., S. Michael Palermo, Joseph L. DiRienzo, Samuel S. Carnabuci, Melvin M. Shelton, Deborah Kovel, George Pilecki and Sean Pilecki.

The Respondent is Charles Christy, plaintiff below.

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OPINIONS BELOW

The opinion of the District Court below is reported at 845 F.Supp. 1097 (E.D. Pa. 1994), and is reproduced *infra* at App. 1a-18a. The Opinion of the Third Circuit Court of Appeals is reported at 54 F.3d 1140 (3d Cir. 1995), and is reproduced *infra* at App. 23a-39a.

JURISDICTION

The judgment of the Third Circuit Court of Appeals was initially entered on March 27, 1995. The Court of Appeals granted rehearing, vacating the initial judgment, and subsequently filed a new opinion and judgment on May 23, 1995. The Court of Appeals denied the Petitioners' timely petition for rehearing on July 13, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATEMENT OF THE CASE

Factual Background

Petitioners Vincent Greco and John Stewart are mid-level managers at the Pennsylvania Turnpike Commission, an instrumentality of the Commonwealth of Pennsylvania. Petitioner Robert Brady is a Commissioner of the Pennsylvania Turnpike Commission. In 1993, there was a vacancy for the position of Eastern Region paint crew foreman. Pursuant to established procedures for filling vacancies,[1] several people, including Respondent, Charles Christy (a Commission employee) applied for the position. Petitioners, Vincent Greco and John Stewart, as well as another Commission official, John

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1 The procedure followed in 1993 for making promotions involved a three-step process. First, a three-member interview committee would be appointed to interview all candidates using a predetermined list of questions. The committee could recommend from three to six candidates to the Commission Personnel Committee. The Personnel Committee reviewed the material supplied by the interview committee and selected one candidate to recommend to the Commissioners. The Commissioners then voted to approve or reject the recommendation.

Boschi, conducted interviews of all applicants. Following Commission procedure, this interview committee recommended three individuals, Christy, another Turnpike employee, Sean Pilecki, and one non-Commission employee, as the three most qualified candidates for this position. In accordance with Commission procedure, these three candidates' names were submitted to the Personnel Committee which recommended Sean Pilecki for the position. The Commissioners then approved the recommendation and Pilecki became paint crew foreman.[2]

Petitioners Greco and Stewart had nothing to do with the filling of the paint crew foreman vacancy after interviewing Christy and recommending him as one of the three most qualified candidates.

Stewart also interviewed Christy for another promotion candidacy, as Regional Equipment Manager - Eastern Division, but in that case the three interviewers did not recommend Christy as one of the three top candidates for this position. Following Commission procedure, one of the three top candidates was recommended by the Commission's Personnel Committee, and that recommendation was then approved by the Commissioners.

Petitioner Robert Brady is the only Commissioner originally named as a defendant in this case; his only role in this case was to vote to approve on a "yes or no" basis the

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2 After the petitioners filed for summary judgment, Plaintiff Christy added as defendants all members of the Personnel Committee and the remaining Commissioners, as well as Sean Pilecki and his father, a retired Commission employee. Summary judgment motions asserting qualified immunity are currently pending for all of the added defendants in the District Court.

recommendations of the Personnel Committee for the paint crew foreman, and Regional Equipment Manager - Eastern Division positions.

Summary Judgment Motions

Christy filed suit pursuant to 42 U.S.C. § 1983 alleging that the defendants made adverse employment decisions against him based on his political affiliation, in violation of his First Amendment rights. Jurisdiction before the District Court arose pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1331 (general federal question jurisdiction).

Greco and Stewart moved for summary judgment on grounds, *inter alia*, of qualified immunity, asserting that because they merely interviewed Christy, among other candidates, for the promotion, and had no participation in the final selection process, they should not have to stand trial. Greco asserts that it would be legally and factually absurd to hold him for trial in this case when his only involvement was to **recommend** Christy as one of the three top candidates.

Brady also moved for summary judgment asserting qualified immunity. He stated in an affidavit uncontradicted on the record that all he did was vote to approve the single candidate recommended by the Personnel Committee for each promotion.

Under the Qualified Immunity doctrine, there are two separate inquiries. The first is whether the legal principles governing the defendants' actions were clearly established at the time. If the relevant law was clearly established, the second inquiry must be posed, whether a reasonable official in the circumstances of each defendant would believe that his or her conduct was consistent with the clearly established law.

This issue is addressed under a test of "objective reasonableness". *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Qualified immunity protects an official, even when the relevant law is clearly established, where a reasonable official in the same circumstances could conclude that his actions were consistent with clearly established law.

Petitioners do not claim ignorance or confusion about the applicability of clearly established legal principles relevant to the promotions at issue. Under *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), political discrimination in public employment promotional decisions is unconstitutional. There is no confusion about this principle in this case; the issue is whether Greco and Stewart (who merely interviewed Christy as part of a "screening" panel), and whether Brady (who merely voted to approve the recommended applicant), could reasonably have believed that their conduct was consistent with *Rutan*.

The Decisions Below

After reviewing Christy's allegations, the district court devoted most of its opinion to describing the *Rutan* decision, and that it established clear legal principles, even though Petitioners had never denied that *Rutan* applied. The district court abruptly disposed of the second prong of the qualified immunity issues by concluding as follows:

> "[I]t is clear that defendants were all involved in the promotions process in this case. Accordingly, viewing all of the evidence...in the manner most favorable to the plaintiff, we are unable to find as a matter of law that these defendants did not violate Mr. Christy's clearly established rights or that they are entitled to the cloak of qualified immunity from this suit."

Christy v. Pennsylvania Turnpike Commission, 845 F.Supp. 1097, 1105 (E.D. Pa. 1994) (App. at 14a-15a). Neither the plaintiff nor the district court identified any factual issues to prevent a decision on qualified immunity.

A pre-trial appeal was taken pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985).[3] On the issue of qualified immunity, the Court of Appeals initially refused even to accept appellate jurisdiction on this issue by stating:

> We will dismiss for lack of appellate jurisdiction the individual defendants' appeals from the district court's denial of their motions for summary judgment on qualified immunity grounds. While we have appellate jurisdiction to consider the denial of summary judgment when such denial is based on the district's conclusion that the movant is not entitled to qualified immunity, *see, e.g., Brown v. Grabowski*, 922 F.2d 1097, 1105 (3d Cir. 1990), the district court in this case did not rule that the individual defendants were not entitled to qualified immunity. Rather, it ruled that it could not find qualified immunity based on the facts at summary judgment. The district court could still find at the close of evidence at trial that the individual defendants are entitled to qualified immunity in relation to Christy's

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3 This appeal included the issue of whether the Pennsylvania Turnpike Commission itself was entitled to Eleventh Amendment Immunity. The Court of Appeals denied immunity largely in reliance on this Court's opinion in *Hess v. Port Authority Trans-Hudson Corp.*, 115 S.Ct. 394 (1994). However the Court of Appeals refused to remand the issue for development of a record to meet the requirements of *Hess*, even though remand had been specifically requested by the Commission. *See infra* at 23-24.

> claims brought against them in their individual capacities.

Christy v. Pennsylvania Turnpike Commission, 1995 WL 127077, *1 n.4 (3d Cir. March 27, 1995), rehearing granted April 27, 1995, on rehearing, 54 F.3d 1140 (3d Cir. 1995).

On petition for rehearing, the original opinion of the panel was vacated. Without additional briefing or argument, a new opinion issued, which acknowledged appellate jurisdiction but affirmed the denial of qualified immunity. After finding that it had appellate jurisdiction, the Third Circuit held as follows:

> When the disputed facts are viewed in the light most favorable to Christy . . . we agree that the individual defendants were not entitled to qualified immunity.

Christy v. Pennsylvania Turnpike Commission, 54 F.3d 1140, 1143 n.4 (3d Cir. 1995) (App. at 27a).

The Third Circuit's analysis of the issue of qualified immunity is contrary to settled law of this Court and most courts of appeals. Under the second prong of the qualified immunity test, the issue is whether the defendant's conduct would strike an objective observer as falling within the range of reasonable judgment. *Anderson v. Creighton*, 483 U.S. 635 (1987). The District Court and the Third Circuit failed to apply the second prong in this case by viewing the facts in the light most favorable to the plaintiff.

REASONS FOR GRANTING THE PETITION

A. The Analysis Applied In The Decisions Below is Inconsistent With This Court's Qualified Immunity Decisions

1. The Decisions Below Were Inconsistent With the Two-Part Test That This Court Has Consistently Required Lower Courts To Use in Analyzing Qualified Immunity

This Court has repeatedly and consistently held that officials are entitled to qualified immunity if the legal principles governing their actions were not clearly established, or if reasonable officials in the same circumstances would believe that their actions conformed to the clearly established legal principles. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) ("the court should ask whether the [defendants] acted reasonably under settled law in the circumstances"); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Mitchell v. Forsyth*, 472 U.S. 511, 527-28 (1985); *Davis v. Scherer*, 468 U.S. 183, 191 (1984) (qualified immunity depends on "'the objective reasonableness of [the defendant's] conduct as measured by reference to clearly established law'") (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

In *Anderson v. Creighton*, this Court held that "the principles of qualified immunity that we reaffirm today require that [the defendant] be permitted to argue that he is entitled to summary judgment on the ground that, in light of the clearly established principles governing [his conduct], he could, as a matter of law, reasonably have believed that [the action taken] was lawful." 483 U.S. at 641 (footnote omitted). *Anderson* reaffirmed that this Court has upheld qualified immunity for

officials "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Id.* at 638. In *Malley v. Briggs*, this Court stated that qualified immunity protects "all but the plainly incompetent or those that knowingly violate the law." 475 U.S. at 341.

Qualified immunity, as formulated by this Court, protects an official, even when the relevant law is clearly established, where a reasonable official in the same circumstances could conclude that his actions were consistent with the clearly established law.

The Third Circuit (and the District Court) in this case considered the qualified immunity claims of Petitioners in a manner clearly inconsistent with the analysis this Court has used and required lower courts to use. Both the District Court and the Court of Appeals below erroneously analyzed the facts "in the light most favorable to plaintiff," which denied the defendants the benefit of the "objectivity reasonable" test uniformly applied by this Court and most other courts of appeal. The courts below denied qualified immunity to the Petitioners after concluded that the law governing Petitioners' actions were clearly established, without even considering whether the defendants could reasonably have believed that their conduct was consistent with clearly established law.

The approach used by the courts below fails to effectuate the important policies underlying qualified immunity. Determining qualified immunity based solely on whether the law was clearly established unduly limits its application to situations where governing legal principles are developing or uncertain. However, this Court has never spoken in such limited terms about the doctrine. Rather, it has stated that qualified immunity is intended to guard against the danger that litigation and potential personal liability "will unduly inhibit

officials in the discharge of their duties." *Anderson*, 483 U.S. at 638 (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). While recognizing the need to provide redress against officials who abuse their position, this Court has focused on the social costs that result from suits against public officials, and the decreased effectiveness, energy and ardor of an official forced to defend his actions. *Harlow v. Fitzgerald*, 457 U.S. at 814. This potential cost is equally real whether the applicable law is developing or already clearly established. The focus has always been on the reasonableness of the official's conduct rather than the state of the relevant law.

The incomplete test applied by the courts below, considering only whether the law is clearly established, is too narrow to vindicate the important policies underlying qualified immunity.

2. The Decisions Below Were Inconsistent with Supreme Court Decisions Ruling that The Determination of Whether the Defendant Could Believe His Conduct Complied With Clearly Established Law Is An Issue of Law

The decisions of the District Court and Court of Appeals, in reviewing the facts "in the light most favorable to plaintiff" were directly inconsistent with decisions of this Court, that courts "need not consider the correctness of the plaintiff's version of the facts." *Mitchell v. Forsyth*, 472 U.S. at 528; *See also Johnson v. Jones*, 115 S. Ct. 2151, 2156 (1995). In *Mitchell*, the Court held that the issue raised in an appeal from a denial of qualified immunity is "a purely legal one." 472 U.S. at 528 n. at 9. In explaining why a denial of qualified immunity is immediately appealable, the Court stated:

> [An] Appellate Court reviewing the denial of defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts, the defendant's conduct violated clearly established law, ***whether the law clearly proscribes the actions the defendant claims he took.***

Id. at 428 (footnote omitted, emphasis added).

In *Johnson*, the Court reviewed the *Mitchell* rationale in detail and unanimously reaffirmed it. However, the specific claim in *Johnson* involved not an assertion that the defendant reasonably could have believed his conduct was legal, but rather an assertion that he did not even engage in the conduct alleged -- a purely factual inquiry. Thus, *Johnson* held that appellate jurisdiction did not lie under the collateral order doctrine. 115 S. Ct. at 2159.

Unlike *Johnson*, the qualified immunity claim in this case does not involve a factual issue of what the petitioners did or did not do. The claim is based strictly on the assertion that the petitioners could reasonably have believed that their conduct in connection with the disputed promotions was consistent with the clearly established law. Neither court below addressed this question. Instead, the district court denied qualified immunity merely by "viewing all of the evidence in this matter in light of the foregoing precedent and in the manner most favorable to the plaintiff." 845 F. Supp. at 1105

(App. at 14a-15a). The Third Circuit repeated this error by concluding that "when the disputed facts are viewed in the light most favorable to Christy, as they must at summary judgment, we agree that the individual defendants were not entitled to qualified immunity." 54 F.3d at 1143, n.4 (App. at 27a).

It was legal inconsistent with Supreme Court precedent for the Third Circuit to refuse to consider the second prong of the qualified immunity test, by referring to disputed facts and ruling that the facts must be "viewed in the light most favorable to Christy". The lower courts in this case were duty bound to look at the conduct of the defendants from the point of view of an objective observer, and decide whether their conduct "would strike an objective observer as falling within the range of reasonable judgment." *See, e.g., Gooden v. Howard County, Maryland,* 954 F.2d 960, 965 (4th Cir. 1992) (citing *Anderson v. Creighton, supra*).

Indeed, the Third Circuit's treatment of this issue is inconsistent with its acceptance of jurisdiction in footnote 4 of its opinion.[4] As pointed out by this Court this last term in *Johnson v. Jones*, 115 S.Ct. 2151 (1995), a reviewing court has jurisdiction to decide the issue of qualified immunity prior to trial if the record shows that those facts necessary for consideration of the issue are not in dispute. On the other hand, where the determination of qualified immunity only involves a factual issue of whether the defendant engaged in the alleged illegal conduct, there is no interlocutory appellate jurisdiction. *Id.* at 2159. By ruling that it had jurisdiction of

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4 Acknowledging that this Court was considering the interlocutory jurisdiction issue in *Johnson v. Jones*, 115 S. Ct. 2151 (1995), the Court of Appeals asserted that it had jurisdiction to decide the qualified immunity issue, which necessarily implied that there were no factual disputes concerning resolution of that issue. 54 F.3d at 1143, n.4 (App. at 27a).

the issue under the collateral order doctrine,[5] the Third Circuit acknowledged *a fortiori* that there were no disputed facts on the issue of qualified immunity. That is true of the record in this case, where there is no dispute as to what Petitioners Greco, Stewart and Brady did or did not do, and therefore no dispute of fact material to the determination of qualified immunity. The refusal of the Court of Appeals to address qualified immunity as a legal issue was inconsistent with the decisions of this Court.

B. Certiorari Should Be Granted Because The Decision Below Is Inconsistent With The Approach Taken By Other Circuits, Which Consider Whether Officials Could Reasonably Have Believed That Their Actions Were Consistent With Clearly Established Law

The partial qualified immunity analysis applied by the Court below is inconsistent with the more complete analysis applied by a number of other circuits which determine not only whether the relevant legal standards were "clearly established" but also whether the official reasonably could have believed his actions were consistent with clearly established law.

First Circuit. In *Figueroa-Rodriguez v. Aquino*, 863 F.2d 1037, 1043 (1st Cir. 1991), the court analyzed both prongs of the qualified immunity rule to find 1) that the alleged constitutional right was not clearly established; and 2) the defendants' objective perception of their action was the focus of the inquiry. *See also Rodriques v. Furtado*, 950 F.2d 805, 812 (1st Cir. 1991) *cert. denied*, 498 U.S. 1041 (1991) (affirming grant of qualified immunity in Fourth Amendment

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5 *See Mitchell v. Forsyth*, 472 U.S. at 528-30 (citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)).

(affirming grant of qualified immunity in Fourth Amendment case, finding that defendant could reasonably have believed his conduct was legal); *Amsden v. Moran*, 904 F.2d 748 (1st Cir. 1990) (affirming grant of qualified immunity in case alleging Fourteenth Amendment due process violations, where relevant law was clearly established, but defendant could reasonably have believed his conduct was legal).

Second Circuit. In *Weaver v. Brenner*, 40 F.3d 527, 537 (2d Cir. 1994), the district court had granted or denied qualified immunity on separate claims, in a case involving the application of the constitutional protection against self-incrimination in a criminal case. The Court of Appeals granted qualified immunity, stating that:

> [a] determination that the relevant right was clearly established at the time it was allegedly violated by the public officials does not end the qualified immunity inquiry. The defendants are still entitled to qualified immunity if it was objectively reasonable for them to believe their actions were lawful.

Id. at 536-37. *See also O'Neill v. Town of Babylon*, 986 F.2d 646, 649-50 (2d Cir. 1993) (reversing denial of qualified immunity in post-trial appeal because it was objectively reasonable for defendant to believe his actions were consistent with clearly established law); *Cartier v. Lussier*, 955 F.2d 841 (2d Cir. 1992) (reversing a denial of qualified immunity in Fourth amendment case because defendant could reasonably have believed his actions were legal).

Fourth Circuit. In *Rowland v. Perry*, 41 F.3d 167 (4th Cir. 1994), the Court of Appeals affirmed the grant of qualified immunity in a civil rights claim for excessive force and unlawful detention brought against a police officer arising out

of a scuffle with a private citizen. The Court emphasized the "objective reasonableness" standard prescribed by this Court. In affirming the grant of qualified immunity to the police officer, the Court of Appeals stated:

> The reasonableness inquiry is an objective one. [*Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).] To gauge objective reasonableness, a court examines only the actions at issue and measured them against what a reasonable police officer would do under the circumstances. *Graham v. Connor*, 490 U.S. 386, 397 (1989). Subjective factors involving the officer's motives, intent, or propensities are not relevant. The objective nature of the inquiry is specifically intended to limit examination into an officer's subjective state of mind, and thereby enhance the chances of a speedy disposition of the case. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991).
>
> Though it focuses on the objective facts, the immunity inquiry must be filtered through the lens of the officer's perceptions at the time of the incident in question. Such a perspective serves two purposes. First, using the officer's perception of the facts at the time limits second-guessing the reasonableness of actions with the benefit of 20/20 hindsight. Second, using this perspective limits the need for decision-makers to sort through conflicting versions of the "actual" facts, and allows them to focus instead on what the police officer reasonably perceived. In sum, the officer's subjective state of mind is not relevant to the qualified immunity inquiry but his perceptions of the objective facts of the incident in question are.

41 F.3d at 172-73 (lower court citations omitted).

Similarly, in *Gooden v. Howard County, Maryland*, 954 F.2d 960 (4th Cir. 1992), the same court upheld qualified immunity in a Fourth Amendment claim against police officers who had taken an apartment occupant into custody for emergency psychiatric evaluation, based on their belief that she was the source of a disturbance and posed a threat to herself and others. This case reaffirmed that the appropriate focus of objective reasonableness is on the conduct of the defendants, not the state of the law:

> [t]he basic purpose of qualified immunity is to spare individual officials the burdens and uncertainties of standing trial in those instances where their conduct would strike an objective observer as falling within the range of reasonable judgment."

Id. at 965 (citing *Anderson v. Creighton*, 483 U.S. 635 (1987)).

Fifth Circuit. Clear application of qualified immunity doctrine is also shown in the decision of the Fifth Circuit Court of Appeals in *Mangieri v. Clifton*, 29 F.3d 1012 (5th Cir. 1994). In *Mangieri* the Court stated flatly what this Court has been holding for a number of years, "we recently determined that a district court errs in 'holding that the objective reasonableness prong of the qualified immunity standard is generally a factual question for the jury.'" Id. at 1015 (relying on *Hunter v. Bryant*, 502 U.S. 224 (1991)).

Anticipating the holding of *Johnson v. Jones*, 115 S. Ct. 2151 (1995), the Court noted that some disputed questions of fact could eliminate jurisdiction to hear a pretrial appeal of denial of summary judgment, but that the objective reasonableness issue was not an issue of fact. After discussing the facts, the Fifth Circuit used the appropriate analysis to conclude that the defendants "possessed the requisite

objectively reasonable basis for probable cause to arrest" the plaintiff. 29 F.2d at 1018. *See also Duckett v. City of Cedar Park*, 950 F.2d 272, 280 (5th Cir. 1992) (granted qualified immunity in case alleging due process violations, stating that well-settled state of the law was not dispositive, and that the grant of qualified immunity depended on whether, according to an objective standard, a reasonable official would have known his conduct to be unlawful).

Ninth Circuit. The Ninth Circuit has consistently applied both prongs of qualified immunity. In *Schroeder v. McDonald*, 55 F. 3d 454 (9th Cir. 1995), the Court stated:

> The qualified immunity test required a two-part analysis: "(1) was the law governing the officials' conduct clearly established? (2) Under that law, could a reasonable officer have believed the conduct was lawful?" * * * Because the law governing defendants' conduct was clearly established, we must determine whether a reasonable prison official could have believed the conduct was lawful.

Id. at 461 (quoting *Act Up!/Portland v. Bagley*, 988 F. 2d 868, 871 (9th Cir. 1993)). In applying this test to an Eighth Amendment claim, the court held that the defendants were entitled to qualified immunity in all but one of the asserted claims.

In *Romero v. Kitsap County*, 931 F. 2d 624 (9th Cir 1991), the Court reversed the district court's denial of qualified immunity, emphasizing that "regardless of whether the [alleged] constitutional violation occurred, the officer should prevail if the right asserted by the Plaintiff was not 'clearly established' or the officer could have reasonably believed that his particular conduct was lawful." *Id.* at 627.

In explaining the error of the district court below, the *Romero* court gave instructions that might well have been heeded by the courts below in this case:

> However, when qualified immunity is at stake, a court must first determine whether the law has been clearly established. *Tribble [v. Gardner]*, 860 F.2d at [321, 324 (9th Cir. 1988)]. If the court decides the law is clearly established, it must then decide whether a reasonable officer would have known that his conduct violated rights. *Id.*

Romero, 931 F.2d at 628.[6]

This survey of circuits demonstrates that the approach taken to analyze the petitioners' qualified immunity claims in this case is starkly inconsistent with the two-prong test applied in most other circuits. Petitioners assert that if the District Court or Court of Appeals below had applied both parts of the test for qualified immunity, it would have concluded that the petitioners were entitled to summary judgment on qualified immunity grounds. The basis for this assertion is clear: the petitioners were following a Commission procedure for determining promotions that was set up in order to comply with

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6 At least two additional circuits have applied the second prong of qualified immunity test in cases involving alleged Fourth Amendment violations. ***Seventh Circuit*** -- *Jones by Jones v. Webb*, 45 F.3d 178, 184 (7th Cir. 1995) (granting qualified immunity in excessive force case because "reasonable officer in [defendant's] position would have believed that the force applied was justified in light of existing law); *Ellis v. Wynalda*, 999 F.2d 243, 246 (7th Cir. 1993) (applying "objective reasonableness" prong, but concluding that officer was not entitled to qualified immunity); ***Tenth Circuit*** -- *Romero v. Fay*, 45 F.3d 1472, 1475-76 (10th Cir. 1995) (applying objective reasonableness inquiry to fourth amendment claim and granting qualified immunity).

Rutan. There is no dispute that the procedure was in fact followed, and no dispute as to the limited involvement of the Petitioners; as a matter of law petitioners could reasonably believe, therefore, that their conduct was consistent with *Rutan*. This Court should grant certiorari to clearly hold that the second prong identified in Supreme Court decisions and applied by numerous other circuits must be uniformly applied as part of the test for qualified immunity.

C. Certiorari Should Be Granted So That This Court Can Establish A Uniform Application of the Second Prong Of Qualified Immunity Because The Circuits Have Utilized Inconsistent Tests, Both Internally and From Circuit to Circuit

While most circuits' application of the two prong approach is consistent with this Court's decisions, the tests applied by some of the circuits are inconsistent and in some cases confused, not only from court to court but also within some circuits. As stated above, the most common approach is to consider both prongs of the test: whether the law is clearly established, and whether the defendants reasonably could have believed their conduct was consistent with the clearly established law. *See supra* at 13-18.

Several courts, however, have incorrectly incorporated the second prong - whether a reasonable official could believe his actions were lawful - not as a separate prong, but as a means of evaluating whether the law was clearly established.

Fourth Circuit. *Pritchett v. Alford*, 973 F.2d 307, 315 (4th Cir. 1992) (holding that a finding that an alleged right was clearly established necessarily resolved the issue of objective reasonableness and precluded qualified immunity because a

reasonably competent official would have known that his actions would violate that right).

Sixth Circuit. *Long v. Norris*, 929 F.2d 1111, 1115 (6th Cir.), *cert. denied sub nom. Jones v. Long*, 502 U.S. 863 (1991) (granting qualified immunity because the law regarding unreasonable searches of prison visitors was not clearly established, and noting that the objective reasonableness component of the qualified immunity analysis was not a separate consideration, but rather furthered the end of determining whether a particular right was clearly established); *Guercio v. Brody*, 911 F.2d 1179, 1183-84 (6th Cir. 1990), *cert. denied*, 500 U.S. 904 (1991) (ruling that court must determine whether the law is so clearly established at the time of the alleged violation that a reasonable actor should know that his action is unlawful).

Eighth Circuit. *Henderson v. Baird*, 29 F.3d 464, 467 (8th Cir. 1994) *cert. denied,* 115 S.Ct. 2584 (1995) (determination whether right is clearly established is based in part on whether reasonable official would understand his actions to violate that right); *Mahers v. Harper*, 12 F.3d 783, 785 (8th Cir. 1993) (same).

Eleventh Circuit. *Lassiter v. Alabama A&M University*, 28 F.3d 1146, 1149 (11th Cir. 1994) ("for the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed . . . to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates federal law.") (quoting *Anderson*, 483 U.S. at 640); *Kelly v. Curtis*, 21 F.3d 1544 (11th Cir. 1994) (plaintiff must show that "the law established the contours of a right so clearly that a reasonable official would have understood his acts were unlawful").

Several of the Circuits use the second prong in cases involving Fourth Amendment claims, but apparently not in other contexts.

Fifth Circuit. *Compare Thompson v. City of Starkville*, 901 F.2d 456, 468 & n.12 (5th Cir. 1990) (employment termination claim in which the court denied qualified immunity; objective reasonableness was considered only in terms of whether the law was so clearly established that a reasonable official would have understood that his conduct violated that right), and *Doe v. Taylor Independent School District*, 15 F.3d 443, 455-56 (5th Cir.), *cert. denied sub nom., Lankford v. Doe*, 115 S. Ct. 70 (1994) (in case alleging substantive due process violations, analyzing qualified immunity claim only with respect to whether the allegedly violated right was clearly established, and stating that if the law was indeed clearly-established, then a reasonable person should and would know when his conduct violated that law) *with Duckett v. City of Cedar Park*, 950 F.2d 272, 280 (5th Cir. 1992) (in case alleging due process violations arising from an improper arrest, court granted qualified immunity stating that well-settled state of the law was not dispositive, and that the grant of qualified immunity depended on whether, according to an objective standard, a reasonable official would have known his conduct to be unlawful), and *Mangieri v. Clifton*, 29 F.3d 1012, 1018 (5th Cir. 1994) (in Fourth Amendment case, court granted qualified immunity because the defendants "possessed the requisite objectively reasonable basis for probable cause to arrest" the plaintiff).

Seventh Circuit. *Compare Burns v. Reed*, 44 F.3d 524, 526 (7th Cir.) *cert. denied*, 115 S.Ct. 2583 (1995) (in case alleging due process violations based on allegedly coerced confessions, qualified immunity was addressed only in terms of whether the law was clearly established), and *Marshall v. Allen*,

984 F.2d 787, 792-93 (7th Cir. 1993) (in case alleging retaliatory discharge in violation of First Amendment rights, qualified immunity analyzed only in terms of whether relevant law was clearly established), *with Jones by Jones v. Webb*, 45 F.3d 178, 183-84 (7th Cir. 1995) (in case alleging unreasonable seizure and excessive force, qualified immunity analyzed in terms of whether a reasonable officer could have believed his conduct was constitutional in light of existing law), and *MacDonald v. Haskins*, 966 F.2d 292, 293 (7th Cir. 1992) (excessive force claim in which qualified immunity defense was decided by looking to both the clearly established law and to "whether, at the time of the seizure, a reasonable officer could have believed [defendant's] conduct was constitutional" in light of existing law.)

The analysis applied by these circuits in the context of Fourth Amendment/arrest claims is consistent with the analysis used by this Court, and Petitioners submit that these cases correctly analyze qualified immunity. On the other hand, nothing in this Court's decisions supports or justifies the failure to consider the second prong of qualified immunity in other contexts.

Tenth Circuit. Finally, the Tenth Circuit has developed its own version of the standard:

> Once the defense has been raised and the plaintiffs have met their burden of identifying both the clearly established law that the government official is alleged to have violated and the conduct that violated that law, the defendant must demonstrate that no material issues of fact remain as to whether his or her actions were objectively reasonable in light of the law and the information he or she possessed at the time. *Pueblo Neighborhood Health Center, Inc. v. Losavio*, 847 F.2d

642, 646 (10th Cir. 1988). A defendant who makes such a showing of objective reasonableness is entitled to summary judgment unless the plaintiff can demonstrate that there are factual disputes relevant to the defendant's claim to immunity. *DeVargas v. Mason & Hanger-Silas Co.*, 844 F.2d 714, 719 (10th Cir. 1988) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

Coen v. Runner, 854 F.2d 374, 377 (10th Cir. 1988). *See also Walter v. Morton*, 33 F.3d 1240, 1242-43 (10th Cir. 1994); *Hinton v. City of Elwood Kansas*, 997 F.2d 774, 449 (10th Cir. 1993).

Clearly, there are significant inconsistencies among and within the circuits regarding the proper test for applying qualified immunity. Even though there are scores of appellate decisions issued every year on this issue, there exists a serious lack of uniformity as to the test to be applied.

D. The Circuit Court's Rejection Of The Commissions' Eleventh Amendment Claim By Application Of A New Standard Placing The Burden Of Proof On Defendants To Affirmatively Establish Facts In Support Of Eleventh Amendment Immunity Was Inconsistent With Law And Policy, Particularly In Refusing To Remand The Issue To Allow Defendants To Comply With The New Standard

The Third Circuit, in an issue of "apparent first impression in this Circuit", held that defendants asserting Eleventh Amendment immunity bear the burden to establish that it should apply. 54 F.3d at 1144 (citing *ITSI TV Productions v. Agricultural Associations*, 3 F.3d 1289 (9th Cir. 1993)), (App. at 28a). That threshold determination virtually pre-determined the outcome of the Eleventh Amendment

analysis, since the record was not developed on the factors which this Court recently held relevant in *Hess v. Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394 (1994), and on which decision the Third Circuit relied in denying Eleventh Amendment immunity. *Hess* substantially overruled a prior Third Circuit case, *Port Authority Police Benevolent Ass'n v. Port Authority of New York & New Jersey*, 819 F.2d 413 (3d Cir. 1987). The relevant factors include Commission funding, ability of the Commission to satisfy judgments against it, and the Commonwealth's obligations for judgments against the Commission.

Since the Eleventh Amendment, where applicable, deprives the court of jurisdiction, the Commission moved for summary judgment based on plaintiff's failure to present any facts that would subject the Commission to jurisdiction. The Third Circuit held, for the first time, however, that a defendant asserting Eleventh Amendment immunity must do more -- it must affirmatively establish facts that justify the Eleventh Amendment immunity. This new rule shifts and dramatically increases the burden placed on defendants who are claiming Eleventh Amendment immunity. However, the defendants were not given any opportunity to meet the heightened burden. Instead of remanding the Eleventh Amendment issue to the district court, the panel affirmed the district court's decision which had not applied the new standard. Particularly under the unique circumstances of this case, including the fact that the plaintiff, in response to the Commission's assertion of Eleventh Amendment immunity, dropped the Commission as a defendant,[7] it was improper for the panel to fully deny Eleventh

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7 After the Commission asserted Eleventh Amendment immunity, plaintiff conceded in his Memorandum in Opposition to the Motion for Summary Judgment, filed December 21, 1993, that the Commission sh uld (continued...)

Amendment immunity without giving the Commission an opportunity to develop a record on the relevant issues.

1. The Third Circuit's New Standard Is Improper

In moving for summary judgment, the Commission set forth abundant legal authorities, including state decisional law, and described Pennsylvania's statutory scheme establishing and regulating the Commission. In response, Plaintiff did not assert issues of fact that would prevent summary judgment on the Eleventh Amendment. Thus, there was no reason, under then-existing Third Circuit law, to develop a factual record in support of Eleventh Amendment immunity.

This Court has consistently held that the plaintiff, as the party asserting jurisdiction, bears the burden of establishing jurisdiction, *Kokkonen v. Guardian Life Insurance Company of America*, 114 S. Ct. 1673, 1675 (1994); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182, 189 (1936), as well as the burden of showing genuine issues of material fact in opposing summary judgment, *see, e.g., Anderson v. Liberty Lobby*, 477 U.S. 242, 248-49 (1986). The Third Circuit's new standard shifting that burden to the defendant, at least in the context of summary judgment, is flatly inconsistent with these long-established burdens.

7(...continued)
not be a party to the case. This concession was formalized on the record on February 25, 1994, when Christy filed an Amended Complaint **deleting** the Turnpike Commission as a party. However, plaintiff did continue to assert claims against individual defendants in their official capacity. Subsequently, Christy was permitted to add the Commission back as a defendant in a second Amended Complaint.

2. The Third Circuit's Refusal To Remand For Development Of A Factual Record Reflects A Serious Conflict With The Manner In Which Other Circuits Give Parties An Opportunity To Comply With A New Rule On Burden Of Proof

Where Courts of Appeals change the standards applicable to the issues on appeal, the proper practice is to remand the matter to the district court to apply the new standard, and, where appropriate, develop the record. For example, in *Rosciszewski v. Arete Associates, Inc.*, 1 F.3d 225 (4th Cir. 1993), the court remanded the issue of whether attorneys fees should be awarded based on standards that the appeals court enunciated for the first time:

> [T]his court has not heretofore specifically addressed the standard a district court should apply in exercising its discretion to award attorneys' fees and costs under §505. We now take this opportunity to do so. * * * Although the district court [considered the attorneys' fee issue], it did not have the benefit of our holding today establishing the factors that should be considered in making this determination. We therefore remand for the district court to consider whether an award to Arete under §505 is appropriate under this standard.

Id. at 234 (footnote omitted).

Similarly, in *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642 (10th Cir. 1988), the court affirmed summary judgment on several claims, but remanded the qualified immunity claim after discussing how Supreme Court caselaw should be applied in instances where the substantive claim involves elements of subjective intent. *Id.* at 648-50.

The court concluded that "[b]ecause the standard we apply today had not been announced when the district court denied the defendants' motion in this case," the case would be remanded for further fact-finding. *Id.* at 650.

Courts of Appeals take the same approach where the applicable law or standards of proof for the issues on appeal have been changed by the Supreme Court, by legislation, or by other sources.[8] In these instances, Courts of Appeals have remanded the matters to the district courts to develop and apply facts under the new law or standard. *See, e.g., Satcher v. Honda Motor Co., Ltd.*, 993 F.2d 56, 57 (5th Cir. 1993)(state supreme court opinion changing product liability standards required remand to district court to apply new standards, rather than having appellate court apply the new law in review); *Smith v. Cooper/T. Smith Corp.*, 886 F.2d 755, 756 (5th Cir. 1989)(where the Supreme Court changed the standard for proof of a "pattern" in a RICO claim, case was remanded to district court for further findings under the new standard); *Perez v. Simmons*, 884 F.2d 1136, 1143 (9th Cir. 1988)(newly announced standard from Supreme Court on §1983 claims based on inadequate police training changed the standard of proof, and therefore remand to district court was appropriate); *Rengers v. WCLR Radio Station*, 857 F.2d 363, 366 (7th Cir. 1988)(where a standard for willfulness under ADEA was changed, issue was remanded to the district court for further fact-finding under the new standard); *Wilkins v. University of Houston*, 695 F.2d 134, 135 (5th Cir. 1983)(where Supreme Court had changed the standard of review for class certification and remanded the matter to the circuit level, court of appeals remanded back to district court to apply the new standard); *Bell*

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8 In *EEOC v. Westinghouse Elec. Corp.*, 925 F.2d 619, 631 (3d Cir. 1991), the Third Circuit acknowledged this general rule, but refused to remand that case for other reasons.

v. Manson, 590 F.2d 1224, 1226 (2d Cir. 1978)(noting that the caselaw on the standard applicable to searching pretrial detainees had developed since the district court opinion, the court of appeals remanded to give the moving party the opportunity to establish facts in support of its summary judgment motion); *Huecker v. Milburn,* 538 F.2d 1241, 1246 (6th Cir. 1976) (award of attorneys fees based on a standard subsequently repudiated was vacated and case was remanded for additional fact-finding under new standard). As stated by the Fifth Circuit in *Concerned Citizens of Vicksburg v. Sills,* 567 F.2d 646 (5th Cir. 1978):

> An appellate court "is obligated to take notice of changes in fact or law occurring during pendency of a case on appeal which would make a lower court's decision, though perhaps correct at the time of its entry, operate to deny litigants substantial justice. *Hawkes v. IRS,* 467 F.2d 787, 793 (6th Cir. 1972). In such cases, "where circumstances have changed between the ruling below and the decision on appeal, the preferred procedure is to remand to give the district court an opportunity to pass on the changed circumstances." *Korn v. Franchard Corp.,* 456 F.2d 1206, 1208 (2d Cir. 1972).

567 F.2d at 649-50.

This well-established practice should have been utilized in this case in light of the fact that the court of appeals admittedly imposed a burden of proof as an issue of first impression. Indeed, the defendants specifically requested that if the Court was not willing to grant Eleventh Amendment immunity on the facts of record, that it remand the case so that the record can be completed. The refusal of the third Circuit to remand this matter is directly inconsistent with the long-

standing practice, and effectively denies petitioners the opportunity to have their Eleventh Amendment immunity fully considered prior to trial.

Plaintiff never asserted any factual issues on Eleventh Amendment immunity in opposition to summary judgment, either as to the Commission itself or any individual defendants in their official capacity, as was his burden under F. R. Civ. P. 56. On March 9, 1994, when the district court issued a Memorandum and Order ruling *inter alia,* that the Turnpike Commission was not entitled to Eleventh Amendment immunity, there was no factual record, and there had been no briefing, on the burden of proof issue by any party. Petitioners contend that after *Hess,* the court below erred in putting the burden on the defendants, but even assuming arguendo the correctness of that holding, Petitioners should have the opportunity to present facts on the record to meet the newly articulated burden that Eleventh Amendment immunity should apply in this case.

CONCLUSION

For the reasons stated above, it is respectfully submitted that Certiorari be granted in this case.

Respectfully submitted,

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